IN THE SUPREME COURT OF THE UNITED STATES

79-5930

OCTOBER TERM, 1980 79

Case Number _____

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SUPREME COURT, U.S.

FREDERICK DOUGLAS BRAY #76252
Petitioner Pro Se

versus

THE STATE OF OKLAHOMA
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DATED January 10, 1980

PETITIONER PRO SE
Frederick Douglas Bray #76252
Oklahoma State Penitentiary
Post Office Box 97
McAlester, Oklahoma, 74501

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PEOPLE V. GALLARDO, 257 P.2d 29 .....

UNITED STATES V. REVANS, 496 F.2d 1071 .....

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79-5930

Case Number: _____

PETITION FOR WRIT OF CERTIORARI

I
NATURE OF THIS PROCEEDING

This is a Petition For Writ Of Certiorari by Frederick Douglas Bray a State Prisoner serving a term of ninety-nine (99) years for Attempted Robbery With Firearms. The said ninety-nine (99) year sentence is being s served in the Oklahoma State Penitentiary, Post Office Box 97, McAlester, Oklahoma, 74501

THE OPINION BELOW

The Opinion below, case number PC-79-446, is an mp unpublished order of the Court Of Criminal Appeals of the State of Oklahoma dated October 17, 1979. No Petition For Rehearing was filed. Also, no extension of time has been sought. The OPinion # PC-79-446 is the final Judgment affirming Frederick Douglas Bray's Appeal From Denial of Post Conviction Relief.

JURISDICTIONAL STATEMENT

In the Oklahoma Courts the Petitioner Frederick Douglas Bray alleged that he is being deprived of his liberty in violation of the Due Process Clause of the 14th Amendment of the United States Constitution. Specifically, the petitioner alleges that, in violation of In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368, here the prosecuter did not prove beyond a reasonable doubt "Every Fact Necessary" to constitute the offense of "Attempted Robbery With Firearms", in that, there is no proof of the essential element of aspertation

in this case since no witness testified (1) that the accused took any money or property, (2) requested the victim to give him any money thm or property, or (3) attempted to take any property.

Since the final Judgement #PC-79-446 is dated October 17, 1979; it is believed by the petitioner that this court has jurisdiction under Title 28 U.S.C. Section 1257.

THE QUESTIONS OF LAW PRESENTED

The highest Oklahoma Court held: Frederick Douglas Bray "seeks to have the conviction in Oklahoma county case no. 33558 set aside on the ground that there was not proof beyond a reasonable doubt of every fact necessary in the conviction. In affirming his conviction in that case, this court stated that there was ample evidence to support the conviction. See BRAY V. STATE, Okl. Cr., 450 P.2d 516."

"For that reason, the denial of petitioner's Application For Post Conviction Relief is hereby affirmed."

"SO ORDERED."

"Witness Our hands and the seal of this court, this 17th day of October, 1979."

/s/ Tom Cornish, Presiding Judge
/s/ Tom Brett, Judge
/s/ Wes Bussey, Judge

QUESTION #1 .....

Here, the prosecution alleged in its charge that the defendant "* * * * did attempt * * * to take * * * certain personal property * * * to rob and deprive the said Jack Ledford of said property and convert said personal propetty to his own use and benefit" but the prosecution did not prove this allegation beyond a reasonable doubt since the prosecuter's chif witness expressly denied that the man who shot him (1) took any money or property, (2) requested any money or property, or (3) attempted to take any money or property; thus, the question is whether the facts and circumstances here reflect a violation in of IN RE WINSHIP, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 and MULLANEY V. WILBUR, 421 U.S. 684, 95 S.ct. 1881, 44 L.Ed.2d 508 since the Record #33558 does not affirmatively reflect each essential element of the offense?

SUBDIVISION ...(a) ....

If so, did the Oklahoma Court Of Criminal Appeals err by affirming case Nr. PC-79-446 on October 17, 1979?

Federal Constitutional Provisions Relied upon 14th Amendment, United States Constitutional

"All persons born or naturalized in the United States, ands subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any within its jurisdiction the equal protection of the laws."

STATEMENT OF FACT
AND...
STATEMENT OF THE CASE

PART - A
TRIAL FACTS

On September 28, 1967, the Information #33558 was filed in the District Court of Oklahoma County, Oklahoma. The said charge accused Frederick Douglas Bray of "Attempted Robbery With Firearms"; that is, the said Information #33558 alleged, inter alia, that the defendant "Did attempt to Take Personal Property From Jack Ledford."

On November 14, 1967, the case was tried before the Honorable William Myers, District Judge, sitting with a jury. During the course of the trial, Jack Ledford testified (Tr. 11-20). On direct examination the prosecutor elicited testimony from Jack Ledford that on April 7, 1967, at approximately 5:30 A.M. he (Jack Ledford) and his co-worker, Richard McFarland, were driving a Safeway tractor-trailer North on Lincoln Blvd. in Oklahoma City, Oklahoma (Tr. 12). In the vicinity of Twenty-third (23) St. and North Lincoln, they noticed a car behind them, blinking its lights, and giving the appearance of desiring to pass. Jack Ledford did not yield the right-of-way. When the vehicles reached the vicinity of Twenty Fourth (24) and North Lincoln Blvd. the car was finally allowed to pass the truck (Tr. 13). At this point Jack Ledford said he observed three (3) persons were inside the car (Tr.15). The car moved over in front of the truck and stopped (Tr. 14). Jack Ledford identified the defendant (15-16) as the man who occupied the car that was behind the truck and as the man who got out of the car and approached the truck (Tr. 13). Jack Ledford testified that when the man, he identified as the defendant, reached the truck and stepped upon the left runningboard, he (Jack Ledford) noticed a pistol in the man's hand (Tr. 13). After he and the man exchanged a few words, Jack Ledford testified that he was shot five (5) times (Tr. 13-16).

On Cross Examination Jack Ledford stated positively that the man who shot him (1) did not take any property, (2) did not request any property, and (3) did not attempt to take any property (Tr. 18).

When he testified, the co-worker, Richard McFarland corroborated each essential aspect of Jack Ledford's testimony that the man who shot him (1) did not request any property, (2) did not take any property, and (3) did not attempt to take any property (Tr. 25-26).

An accomplice, Harold Akerson, testified (Tr. 29). And in answer to the question of why Jack Ledford was shot, the accomplice speculated "I guess he (Frederick Bray) was trying to rob him (Jack Ledford) (Tr. 30)." The accomplice punctuated all of his testimony with "I'm not sure", or, "I'm not sure of all the words we said to each other" (Tr. 44).

Another accomplice, Aaron Johnson, testified that he was the driver of the Pontiac car (Tr. 67-86). That the truck was "Taking up all the room" (Tr. 69), thus, he could not pass the truck. That Frederick Bray, apparently exsperated because the truck driver refused to yield the right-of-way (Tr. 70-71) got out of the car to inquire as to why the truck driver would not allow them to pass. Aaron Johnson testified that Harold Akerson was "passed out drunk" in the car (Tr.70). Aaron Johnson contradicted Harold Akerson's testimony insofar as an INTENT to commit a robbery (Tr. 70). Aaron Johnson denied that there was even a conversation about a robbery (Tr. 70).

The jury found the defendant guilty. Thereafter, on December 16, 1967, the trial court sentenced the defendant to serve a term of Ninety-Nine (99) years.

PART - B

DIRECT APPEAL FACTS

Thereafter, the case was appealed to the Oklahoma Court of Criminal appeals, under Appeal Number A-14645; See BRAY V. STATE, Okl Cr., 450 P.2d 515. The said appeal was affirmed on February 5, 1969.

PART - C

HABEAS CORPUS FACTS

Thereafter, a Petition for Writ of Habeas Corpus was filed challenging the conviction on different grounds; See BRAY V. PAGE, Okl. Cr., 494 P.2d 339.

PART - D

PREVIOUS POST CONVICTION FACTS

Thereafter, a Petition for Post Conviction Relief was filed in an attempt to correct the errors this court committed in the Habeas Corpus litigation; See BRAY V. STATE, Okl. Cr.,___P.2d___, No. PC-74-519, affirmed September 9, 1974.

PART - E

THIS INSTANT POST-CONVICTION
LITIGATION FACTS

On June 9, 1975, the U.S. Supreme Court held that the Due Process Rule of In Re WINSHIP, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 was applicable to an adult's murder conviction; see MULLANEY V. WILBUR, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508. On June 17, 1977, the U.S. Supreme Court held MULLANEY V. WILBUR, Supra, fully retroactive; See HANKERSON V. NORTH CAROLINA, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306. The WINSHIP - MULLANEY Due Process Rule constitutes an "Intervening Change In The Law" (See DAVIS V. UNITED STATES, 417 U.S. 333, 94 S.Ct. 2298, 41 L.Ed.2d 109.) The Oklahoma Court of Criminal Appeals has been limiting In Re WINSHIP, Supra to Juvenile Cases and, as far as this writer knows, the Oklahoma Court of Criminal Appeals has not applied the WINSHIP Principle to an adult's conviction; See J.E.S. V. STATE, Okl. Cr., 585 P.2d 382. Apparently, other courts have also erroneously limited the WINSHIP Principle to Juvenile cases; See MULLANEY V. WILBUR, Supra, 421 U.S. at 689, 95 S.Ct. at 1884, 44 L.Ed.2d 508, footnote #8 and HANKERSON V. NORTH CAROLINA, 432 U.S. at 243, 244, 97 S.Ct. at 2344, 2345, 53 L.Ed.2d 306.

Relying upon the exception ("Intervening Change In The Law") on May 18, 1979, the Appellant filed his Application For Post Conviction Relief in case No. 33558 together with a separately written MOTION FOR LEAVE TO FILE SECOND AND SUBSEQUENT PETITION FOR POST CONVICTION RELIEF in Case No. 33558. On June 14, 1979 the District Attorney filed a RESPONSE challenging the petitioner's MOTION FOR LEAVE TO FILE SECOND PETITION FOR POST CONVICTION RELIEF and, in doing so, the District Attorney, either by accident, or design, misconstrued Title 22 O.S. Supp. (1970) § 1086. In his REPLY, the Appellant pointed out to the trial court and the District Attorney that if EDWARDS V. STATE, Okl. Cr., 591 P.2d 313 constitutes an "Intervening Change In the Law", by the same rationale, so does WINSHIP-MULLANEY. The Oklahoma Court of Criminal Appeals, however, has not held the WINSHIP-MULLANEY Principle applicable to all felony trials where a given adult defendant is being deprived of his liberty; See HARRISON V. State, Okl. Cr.,___P.2d__ No. PC-78-170, presently pending in this court. On June 18, 1979 the U.S. Supreme Court decided SANDSTROM V. MONTANA, 442 U.S.___, 99 S.Ct. 2450, 61 L.Ed.2d 39, No. 78-5384 and on June 28, 1979 settled the matter with JACKSON V. VIRGINIA, 443 U.S.___, 99 S.Ct. 2781, 61 L.Ed.2d ___, No. 78-5283. WINSHIP - MULLANEY applies to all trials where a defendant might be deprived of his liberty. Without conducting an evidentiary hearing, on July 11, 1979 the Trial Court denied Post Conviction Relief in Oklahoma County Case No. 33558. From this order denying post conviction relief, the Appellant Frederick Douglas Bray appeals to this court.

Thereafter, the case was appealed to the Oklahoma Court of Criminal Appeals on August ___, 1979, The said Appellate Court held as follows:

See ... Order #PC-79-446 Dated October 17, 1979 .....

"The Petitioner, Frederick Douglas Bray, was charged, tried, and convicted of the crime of Shooting With Intent to Kill and was sentenced to m twenty (2) years in the penitentiary. That conviction was affirmed by this Court in Bray v. State, Okl.Cr., 450 P.2d 512 (1969). He was also charged With Attempted Robbery with Firearms and sentenced to ninety-nine (99) years in the penitentiary. That conviction was affirmed by this Court in Bray v. State, Okl. Cr., 450 P.2d 515 (1969). In 1972, this Court in Bray v. B Page, Okl. Cr., 494 P.ed 339, granted in part a writ of habeas corpus to the petitioner, vacating the judgment and sentence in Oklahoma County Case Number CRF-33134, the shooting with intent to kill conviction, while keeping intact the judgment and sentence in Oklahoma County District Court Number CRF-33558, the attempted robbery with firearms conviction. In 1978, the petitioner attempted to have the attempted robbery with firearms case conviction set aside on the ground that he was tried first on the other conviction. This Court refused to grant him a writ of habeas corpus in that case.

Now he seeks to have the conviction in Oklahoma County Case Number CRF-33558 set aside on the groundt that there was not proof beyond a reasonable doubt of evdry necessary fact in the conviction. In affirming his conviction in that case, this Court stated that there was ample evidence to support the conviction. See Bray v. State, 450 P.2d 515, 516 (1969)

For that reason, the demail of petitioner's application for post-conviction relief is hereby affirmed.

SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT, this 17th day of October, 1979.

/s/ Tom R. Cornish, Prisiding Judge

/s/ Tom Brett, Judge

/s/ Hon J. Bussey, Judge

Based upon the Order #PC-79-446 the petitioner requests this court to grant the Writ of Certiorari to review the final Judgment of the Oklahoma Court of Criminal Appeals.

SUMMARY OF ARGUMENTS

This is a conviction for Attempted Robbery With Firearms and the Primary issue in controversy here is whether on Post Conviction Review the Oklahoma Court of Criminal Appeals erred by Affirming Case No. PC-79-446 even though the trial Transcript #33558 does not affirmatively reflect the essential element that Frederick Douglas Bray "did attempt to take personal property from Jack Ledford".

SUBDIVISION ...(a)...

The record reflects that the Oklahoma trial court relied entirely upon the element "INTENT"; however, one of the arguments here is that the element "INTENT" in and of itself is insufficient to constitute attempted robbery with firearms.

SUBDIVISION ...(b)...

The petitioner argues that in an attempted robbery with firearms case there must be proof of a "OVERT" act, or a physical act, that is sufficient to constitute an attempt to commit the offense charged.

ARGUMENT

Part - A

PROPOSITION #1 ....

The Petitioner Frederick Douglas Bray's conviction, for ATTEMPTED ROBBERY WITH FIREARMS, was obtained in violation of the Due Process Clause of the 14th Amendment, in that:

Subdivision ...(a)...

No witness testified that Frederick Douglas Bray (1) took any money or property, (2) requested the victim to give him any money or property, or (3) attempted to take any money or property, thus, there is no proof in the record that the prosecutor proved beyond a reasonable doubt the essential element ATTEMPT TO TAKE PERSONAL PROPERTY.

Subdivision ...(b)...

Since the victim expressly denied that Frederick Douglas Bray attempted to take any money or property from him; the trial court erred by failing to grant the defense attorney's motion For a Directed Verdict of Acquittal and erred by failing to sustain the defendant's demurrer.

PROPOSITION #2 .....

Under the facts and circumstances of this instant case, the trial court's order denying post conviction relief is in conflict with this court's decisions in IN RE WINSHIP, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 and MULLANEY V. WILBUR, 421 U.S. 684, 95 1881, 44 L.Ed. 2d 508 since the record does not affirmatively reflect each essential element of the offense.

PROPOSITION #3 .....

Under the facts and circumstances of this instant case, the Oklahoma Court of Criminal Appeals ' Order #PC-79-446, dated October 17, 1979, affirming denial of post conviction relief is in conflict with this court's decisions in IN RE WINSHIP, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 and MULLANEY V. WILBUR, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 since the record does not affirmatively reflect each essential element of the offense.

In support his allegation (that there is no proof in the trial Transcript #33558 that the prosecutor proved beyond a reasonable doubt every fact necessary to constitute the offense charged) the Petitioner Frederick Douglas Bray respectfully points out the following testimony of the prosecutor's chief witness, Jack Ledford:

See ..... Trial Transcript #33558, page #18, line #1 ...Cross Examination....

Q...Defense attorney.....

"Mr. Ledford, the person that approached your truck didn't have any more conversation with you than the conversation, or words, that you have already testified to about his utterings: is that correct?"

State witness
A...Jack Ledford.....

"No sir."

Q. "And, as far as you know, was anything taken from the truck by that person on that occasion?"

A. "No, sir."

Q. "Do you know that positively that there was not?"

A. "No, sir."

Q. Well, you said that he departed immediately after firing the last shot?"

A. "Yes."

Q. "Did he have any opportunity to take anything from your truck?"

A. "I wouldn't think so."

Also, see the testimony of the prosecutor's other chief witness, Richard Lee McFarland; see page 25, line #1, to-wit:

Q (Defense Attorney) "Is the conversation between the two people who were speaking, the man who got out fm of the car and did the shooting, and Mr. Ledford is that conversation that you have testified to here all of the conversation that you heard take place between these two?"

A. "(State Witness, Richard McFarland) To the best of my knowledge, yes, sir."

Q. "You did not hear the man that did the shooting make any demand for any money, or any property, or anything x of value, that was in the truck?

A. "No, sir."

Q. "To your knowledge; Was anything taken from your truck, on that occasion?

A. "No. sir."

Q. "After the last shot was fired: did I understand you to say that the man immediately got in this Pontiac Car and then departed?"

A. "As far as I know, he immediately got into the car. As I said, I slumped over in the seat and I lay there for a couple of minutes before raising back up. At this time he was gone."

Q. (Defense Attorney) "No further questions."

Briefly paraphrased; the accomplice, Harold Akerson, testified (Tr. 29) and, in so testifying, the accomplice interjected some speculation as to the defendant's frame-of-mind, or rather, the accomplice speculated as to the defendant's INTENT (Tr. 29). The trial court sustained the defense attorney's first objection to the accomplice's speculation concerning the defendant's frame-of-mind, or INTENT (Tr. 30-31). Concerning his speculation of INTENT-TO-ROB: the accomplice punctuated all of his accusations with "Well, I'm not too sure about that, but I believe he said the truck driver is carrying a lot money." Also, the accomplice testified: "All the words we said to each other, I'm not too sure of it". Subsequently, the trial court and the District Attorney requested the accomplice to merely paraphra se the substance of any remark that the defendam t might have made prior to the shooting: in response to this inquiry the accomplice said (Tr. 44) "Well, I can't remeber at the moment."

TRIAL COURT: "Please State to the best of your recollection just what Bray said?"

Q. (District Attorney, Curtis Harris) "Substantially what he said, maybe not: exact words?"

A. (Accomplice, Harold Akersen) "Well, I can't remember at the moment."

Q. "(District Attorney) "What is it?"

A. "I can't remember at the moment."

Q. "You can't rmember at the moment?"

A. "No."

Q. "Now, what did he say when he got out of the car going back to the truck to you, anything?

INTERRUPTING, Defense Attorney: "Object to that, The witness has answered the question. Object to any further questioning as repetition."

DISTRICT ATTORNEY (interrupting): "Your Honor, it is obvious that this witness ....."

TRIAL COURT: (Interrupting) "I believe that the last question is what the witness said he could not remember at this time, or at this moment. Is that correct?"

DEFENSE ATTORNEY: "That is the way I understood it."

DISTRICT ATTORNEY: "Yes, I guess so."

To be sure, the accomplice did not testify that he (the accomplice) saw the Appellant Frederick Douglas Bray commit any act, or acts, that would constitute an "Attempted Robbery". To the contrary, the accomplice limited his testimony to conjecture, supposition, and speculation concerning "INTENT". INTENT, without the commission of the physical act of a taking or attempting to take, is insufficient.

The other accomplice Aaron Johnson testified (Tr. 70) that Harold Akerson was in "the back seat passed out". Aaron Johnson further ~~dimmx~~ denied that there was any conversation concerning robbing anyone (Tr.70)

The first obvious error here is the absence of any testimony in support of the allegations that appear on the face of Information #33558. Assuming that the prosecutor was aware that the offense of "Attempted Robbery With Firearms" has essential elements (see Title 21 O.S. § 44); the petitioner points out that the prosecutor delievered no evidence that would constitute the offense charged. The Instruction #33558 given ~~mx~~ to the jury contained no explanation or definition of the elements of an Attempt To Rob that would satisfy the requirements of § 44 of Title 21. Thus, the conviction in Oklahoma County Case Number 33558 must be ~~x~~ vacated.

See .. MULLANEY V. WILBUR, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508....

See .. In Re WINSHIP, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 ....

See .. HANKERSON V. NORTH CAROLINA, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed. 2d 306 .....

See .. PATTERSON V. NEW YORK, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281...

See .. PEOPLE V. GOLLARDS, 257 P.2d 29 .....

Compare ....WEIMAR V. STATE, Okl. Cr., 556 P.2d at 1024:

"There are three elements required to be proven in order to prosecute an Attempt To Commit A Crime. They are (1) the Intent to commit a Specified crime, (2) performance of some OVERT ACT towards its commission, and (3) failure of consumation."

ARGUMENT

Part - B

The trial court violated PATTERSON V. NEW YORK, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 by failing to define "ATEMPT" as is required by Title 21 O.S. Section 44, thus:

a.. There is no proof in the Record #33558 that the jury found "Every Fact Necessary to Constitute the Offense " of Attempted Robbery With Fire arms, for, the trial court's Definition of Attempt to commit robbery was ~~and~~ inadequate or insufficient when compared with the standard set forth under Title 21 O.S. § 44.

b.. The trial court failed and/or refused to instruct the jury as to which FACTS they (the Jurors) had to find prior to returning a guilty-verdict and this omission violated MULLANEY V. WILBUR, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 and HANKERSON V. NORTH CAROLINA, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306.

In support of ~~t~~ this Assignment of Error, the Petitioner Federick Douglas Bray respectfully points out that the trial court did not give a sufficient instruction as to the elements of an Attempted Robbery; see Instruction #4. Specificially, the trial court failed to define "ATTEMPTED". A robbery or an Attempted Robbery is a physical act or a combination of acts. The controlling expression that must be defined is ATTEMPTED.

See .... Instruction #4 ... Honorable W.S. Myers, District Judge

Trial Court: "* * * . You are further instructed that every persons who ATTEMPTS to commit the crime of Robbery With Firearms, as this crime has previously been defined, and in such attempt does any act toward the commission of such crime but fails or is prevented or intercepted in the perpetration thereof is guilty of Attempted Robbery With Firearms."

Compare the Information #33558 .....

"* * * * Frederick Douglas Bray * * did Attempt * * * to take * * certain personal property * * to rob and deprive the said Jack Ledford of said Property and convert said personal property to his own use and benefit * * *".

Here, the trial court should have enumerated what essential facts had to be found and then the trial court should have further instructed the jury that the failure to find one, or more, of the essential facts required a verdict of not guilty. Compare ... Petitioner's Exhibit #1, page #3, page #4 and page #5 with the instructions here. Under the Instruction #33558 there is no description, or definition, of what physical act, or acts, the State Was relying upon to prove that the Defendant Frederick Douglas Bray "did attempt to take personal property" from Jack Ledford. The only crime that a given defendant can be found guilty of committing is the offense set forth on the face of the Indictment or Information.

Here, neither the prosecutor's trial evidence nor the trial court's Instructions mentioned what physical ACT, or ACTS, the prosecutor was relying upon that the Information #33558 described as "did Attempt to take personal property."

The victim himself (Jack Ledford) expressly denied that the man who shot him (1) took any property, (2) attempted to take any property, or (3) made a request for any property. Thus, the prosecutor here must point out a physical act, or acts, that he (the prosecutor) is relying upon to prove that the Defendant Frederick Douglas Bray did commit the crime described in Information #33558.

Compare ...PEOPLE V. GALLARDO, 257 P.2d at 35:

> "In our opinion this evidence does not support the conviction for attempts to commit abortions. In order to establish as attempt it must appear that the defendant had a specific intent to commit a crime and did a direct, unequivocal act toward that end; preparation alone is not enough, and some appreciable fragment of the crime must have been accomplished. PEOPLE V. BUFFUM, 40 Ca., P.2d ___, ___ 256 P.2d 317; PEOPLE V. WERNER, 16 Cal 2d 216, 221-22, 105 P.2d 927; PEOPLE V. MILLER, 2x 2d 527, 530-532, 42 P.2d 308 98 A.L.R. The record shows merely preparation and does not disclose any direct, unequivocal act xxx toward the commission of an abortion upon any of the three women. There is no evidence that is no evidence that Glynn or Gallardo started to provide, supply or administer any medicine or to use or employ any instrument or other means procure the miscarring of any of the women. The conduct of Glynn in arranging for operation, filling out hospital cards, and accpeting money did not amount to an attempt. Cf. STATE V. Davis, 319 Mo. 1222, 6 S.W 2d 609, 612; STATE V. LOWRIE, Minn,. 54 N.W. 2d 265, 266-267; STATE V. LAMPE, 131 Minn. 65, 154 N.W. 737, 739."

Here, the defendant was charge with "Attempted" Robbery With Firearms, yet the trial court omitted, and failed to read, the statutory definition of "Attempt: as the same is provided under Title 21 O.S. § 44.

Also see ... PATTERSON V. NEW YORK, 432 U.S. at 210, 97 S.Ct. at 2337, 53 L.Ed.2d 281:

> "* * * The Due Process Clause requires the prosecution to prove beyond ... reasonable doubt all of the elements included in the DIFINITION Of the offense of which the defendant is charge:"

ARGUMENT

Part - C - 50

The Defendant Frederick Douglas Bray was denied Due Process of law by the failure and/or refusal of the trial court to grant the defendant's demurrer and the defendant's Motion For A Directed Verdict of Acquittal.

Subdivision ...(a)...

The records is devoid of any Overt act that would constitute the offense charged.

In support of this assignment of error, the Petitioner Frederick Douglas Bray respectfully points out the following portion of the trial record.

See ... Transcript #33558, page 65, line 13, to-wit:

Q. (defense Attorney) "No further questions."

Prosecutor, Curtis Harris: "The State rests."

Defense Attorney: "Comes now the defendant and demures to the evidence on behalf of the State and moves the court to direct the jury to return a verdict of acquittal for the reason that the evidence wholly fails to show that this defendant has committed the offense of Attempted Robbery With Firearms which is the offense for which the defendant stands trial here."

TRIAL COURT: "The Demurrer will be overruled, to which the defendant is granted exception.
There was evidence on this Harold Akerson which, although the court grants was not too satisfactory, did indicate that there was a robbery intent and for that reason the demurrer is overruled and exception granted."

Here, the trial court admitted that the prosecutor's evidence "was not too satisfactory. This concession must today be viewed under the stringent guide lines of WINSHIP - MULLANEY, supra. The trial court erred as follows: INTENT, in and of itself, is insufficient to constitute Attempted Robbery With Firearms. To Constitute "Attempted Robbery With Firearms" there must be an "OVERT ACT, or OVERT ACTS, committed. Here, the Information #33558 described the physical act as follows:

"Frederick Douglas Bray * * did Attempt * * * to take * * * certain personal property."

Thus, the trial court erred here since there was no Overt or physical Act committed by the defendant that would constitute "An Attempt to take Personal Property.

Under Oklahoma Law the trial court erred by failing to sustain the defendant's Demurrer: See Tittle 22 O.S.A. § 508 and case cited therein. Especially see ... JOHNSON V. STATE, Okl. Cr., 564 P.2d 664, then see, BURKS V. UNITED STATES, 437 U.S. 1, 98 S.Ct. at 2149, 57 L.Ed.2d 1, foot note #10:

> "In holding the evidence insufficient to sustain guilt, an appellate Court determines that the prosecution has failed to prove guilt beyond a reasonable doubt."
> (citation Omitted)

Here, the Record #33558 is devoid of evidence that the defendant "Attempted" to take "personal property", for, taking is a physical act and is not a state of mind. Because the evidence was insufficient; the demurrer should have been granted, for, a Directed Verdict of Acquittal is the only remedy under such circumstances.

See ..... BURKS V. UNITED STATES, 437 U.S. 1, 98 S.Ct. at 2150., 57 L.Ed.2d 1

> "Since we hold today that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, the only just remedy xxxx available for the court is the direction of a Judgment of Acquittal. To the extent that our prior decisions suggest that by moving for a new trial, a defendant waives his right to judgment of acquittal on the basis of evidnetiary insufficientcy, those case are ovdrruled."

Compare, also, .. GREENE V. MASSEY, 437 U.S. 19, 98 S.Ct. 2153, 57 L.Ed.2d 14 ...

REASONS WHY THE VERDICT #33558 MUST BE SET ASIDE AND REASONS WHY RELIEF SHOULD BE GRANTED

Here, the Prosecuter's chief witness, Jack Ledford, denied that the Defendant Frederick Douglas Bray made an "Attempt" to take any "Personal Property" from him; see Tr. 18. In fact, no one at the trial testified that the defendant made any "ATTEMPT" to take any "PERSONAL PROPERTY" ... yet, this was the controlling fact that the jury had to find since this is the description of the offense that is set forth on the face of Information #33558.

The failure of the prosecution to put on evidence that the defendant "Attempted" to take "Personal Property" violated In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 and MULLANEY V. WILBUR, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508, since this is the Contselling Fact. In other words, the

record is devoid of any testimony concering this FACT.

As shown by Petitioner's Exhibit #1, in a jury trial the trial court should enumerate (1) the allegations set forth on the face of the Indictment or Information and (2) the trial court should enumerate the Statutory essential elements of the said offense. Also, since the charge here was "ATTEMPT", the trial court should DEFINE the elements of an "Attempt." Obviously, allegations and essential elements are not the same thing, therefore, a trial court should distinquish between allegations and essential elements. See ...UNITED STATES V. REVANS, 496. F.3d 1071

As an example, the petitioner submits his Exhbit #1 and point out pages #3, #4 and #5 of Exhibit #1 where the court in that case enumerated both the a allegations and elements and, in doing so, the court in that case instructed the jury as follows:

See ... Exhibit #1, page #3 ...

> "On the other hand, if you find from your consideration of all the evidence that any one or more of these elements have not been proved beyond a reasonable doubt, or if you have a reasonable doubt about such, you must find m with respect to such defendant NOT GUILTY and so state by your verdict."

Here, in this instant case there is no proof in the record that the jury found as a FACT "ATTEMPT" to take PERSONAL PROPERTY since the trial court here did not instruct the jury that this FACT had to be found prior to returning a guilty verdict. See WINSHIP, supra, MULLANEY V. WILBUR, supra and JACKSON V. VIRGINA, 443 U.S. _____, 99 S.Ct. 2781, 61 L.Ed.2d 560.

Compare the Oklahoma Statute for Attempt to Commit An offense With the cases construed.

Compare ... Title 21 O.S. (1965) § 44 ..."Attempt Defined" ....

> "A person is guilty of an ATTEMPT TO COMMIT A CRIME if, acting with the kind of culpability otherwise required for commission of the crime, he: (a) purposely engages in conduct which would constitute the crime if the attendent circumstances were as he believes them to be; or (b) when causing a particular result in an element of the crime, does anything with the purpose of causing, or . with the belief that it will cause, such result, without further conduct on his part."

With this case, see ...PEOPLE V. GALLARDO, 257 P.2d 29 ... or with, see ... WEIMER V. STATE, Okl. Cr., 556 P.2d at 1024:

> "There are three (3) elements required to be proven in order to prosecute an ATTEMPT TO COMMIT A CRIME. They are (1) the INTENT to commit a specified crime, (2) performance of some OVERT ACT towards its commission, and (3) and failure of consumation.

The trial court committed a Federal Constitutional error by failing to read Title 22 O.S. § 44 as a Jury Instruction, for, the "Definition" of the offense must be set forth in the Jury Instructions in order to inform the jury what FACTS Must be found prior to returning a guilty-verdict.

See ... PATTERSON V. NEW YORK, 432 U.S. at 210 and at 215, 97 S.Ct. at 2327 and at 2330, 53 L.Ed.2d 281 ....

Essential ingredients, such as ATTEMPT, must be Defined and, also, each ELEMENT set forth in "The Definition of the Offense" must be proven beyond a reasonable doubt (Patterson v. New York, supra,. 432 U.S. at 210, 97 S.Ct. at 2327, 53 L.Ed.2d 281). Here, there is no proof in the record that the prosecutor proved beyond a reasonable doubt each Element set forth on the fact of Information #33558, for, the trial court neither "Defined" nor enumerated the "Essential Elements" ... and either or both omissions constitutes the type of denial of Due Process that requires invalidating the verdict #33558.

REASONS WHY THIS COURT SHOULD GRANT A WRIT OF CERTIORARI

If the Opinion #PC-79-446 of the Oklahoma Court of Criminal Appeals is allowed to stand numerous Oklahoma Prisoners who have meritorious claims that are cognizable under WINSHIP, supra and MULLANEY V. WILBUR, supra will be arbitrarily and capririously denied relief.

If the Opinion #PC-79-446 is allowed to stand the following decisions of thisc court will be eroded: In Re Winship, supra, MULLANEY V. WILBUR, supra, PATTERSON V. NEW YORK, supra, and JACKSON V. VIRGINIA,

CONCLUSION

WHEREFORE the petitioner Frederick Douglas Bray prays that this court will (1) grant the Writ of Certiorari, (2) summarily reverse the case back to the Oklahoma Court Of Criminal Appeals, (3) or grant certiorari, (4) appoint an attorney, (5) hold oral arguments, and (6) vacate Frederick Douglas Bray's conviction for Attempted Robbery With Firearms. ITS SO PRAYED.

Respectfully submitted,

Frederick D. Bray

Frederick Douglas Bray #76252
Oklahoma State Penitentiary
Post Office Box 97
McAlester, Oklahoma 74501

VERIFIVATION

STATE OF OKLAHOMA)
COUNTY OF PITTSBURG) ss:

Frederick Douglas Bray, after being first sworn under oath, affirms that the above Petition For Writ Of Certiorari is true and correct to the best of his knowledge, belief, and memory.

Frederick D. Bray

Frederick Douglas Bray, Affiant

Subscribed and sworn to before me
this 10 th day January , 1980.

Charles Evans

Notary Public

My Commission Expires: 10-11-83

PROOF OF SERVICE

On January 10, 1980 I mailed a copy of the above Petition For Writ Certiorari to Mr. Jan Eric Cartwright, Attorney General of Oklahoma, 112v State Capitol Building, Oklahoma City, Oklahoma, 73105.

Frederick D. Bray

Frederick Douglas Bray
Petitioner Pro Se

RECEIVED
MAR 26 1980
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SUPREME COURT, U.S.

No. 79-5930

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980 79

ORIGINAL COPY

FREDERICK DOUGLAS BRAY,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

RESPONSE BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

JAN ERIC CARTWRIGHT
ATTORNEY GENERAL OF OKLAHOMA

DANNY K. SHADID
ASSISTANT ATTORNEY GENERAL

112 State Capitol Building
Oklahoma City, OK 73105
(405)521-3921

ATTORNEYS FOR RESPONDENT

October, 1980

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

FREDERICK DOUGLAS BRAY,	)	
	)	
Petitioner,	)	
	)	
-vs-	)	No. 79-5930
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Respondent.	)	

RESPONSE BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

COMES NOW the State of Oklahoma, by and through its attorneys, Jan Eric Cartwright, Attorney General of the State of Oklahoma, and Danny K. Shadid, Assistant Attorney General, and for Answer to the Petition for Writ of Certiorari submits to this Honorable Court the following brief in opposition thereto.

JURISDICTION

Petitioner seeks review pro se by way of Petition for Writ of Certiorari to the Oklahoma Court of Criminal Appeals. On October 17, 1979, the aforesaid Court entered its Order affirming a denial of petitioner's Application For Post-Conviction Relief in the District Court of Oklahoma County, Oklahoma. Case No. PC-79-446. Said Order in effect affirmed the Judgment and Sentence rendered in Case No. 33558 (Oklahoma Court of Criminal Appeals No. A-14645).

ISSUES PRESENTED

1. Whether the evidence at trial, when taken in a light most favorable to the prosecution, was sufficient to allow a rational trier of fact to find beyond a reasonable doubt the existence of an intent to rob the victims.

2. Whether the evidence at trial, when taken in a light most favorable to the prosecution, was sufficient to allow a rational trier of fact to find beyond a reasonable doubt the existence of an overt act in furtherance of the crime of robbery with firearms.

3. Whether the trial court's instructions to the jury sufficiently defined the offense of Attempted Robbery With Firearms.

STATEMENT OF THE CASE

Petitioner was originally convicted in the District Court of Oklahoma County, State of Oklahoma, for the offense of Shooting With Intent to Kill and Attempted Robbery With Firearms, Case Nos. 33134 and 33558, respectively. For these offenses, petitioner was sentenced to terms of twenty (20) and ninety-nine (99) years imprisonment, respectively. These convictions were affirmed on direct appeal to the Oklahoma Court of Criminal Appeals and are reported as Bray v. State, 450 P.2d 512 (Okla.Crim. 1969) and Bray v. State, 450 P.2d 515 (Okla.Crim. 1969).

Thereafter, petitioner sought habeas corpus relief in the United States District Court for the Western District of Oklahoma regarding the attempted robbery conviction. Bray v. Page, (W.D. Okla., Case No. 69-465, December 1, 1969). Petitioner alleged a violation of the Double Jeopardy Clause. The Court dismissed the action due to failure to exhaust state remedies.

Petitioner then sought habeas corpus relief in the Oklahoma Court of Criminal Appeals alleging a violation of Okla. Stat. tit. 22, § 11 (1971) which provides that an act or omission which may be punishable in different ways under different statutes may be punishable under either provision. However, an offender can be punished under only one provision. The Oklahoma Court of Criminal Appeals, interpreting the Oklahoma statute to mean that a person cannot be punished twice for the same criminal transaction, granted habeas corpus relief in part by rendering null and void the conviction for Shooting With Intent To Kill. The Court, however, left in full force and effect the Judgment and Sentence in the robbery conviction. See Bray v. Page, 494 P.2d 339 (Okla.Crim. 1972).

Next, petitioner sought post-conviction relief in the Oklahoma Court of Criminal Appeals, alleging an insufficiency of the evidence to corroborate his accomplice's testimony. The Court denied relief on the basis of res judicata. Bray v. Wilson, (Okla.Crim. No. PC-74-519, August 13, 1974).

Petitioner again sought habeas corpus relief in the United States District Court for the Western District of Oklahoma alleging.

inter alia, an insufficiency of the evidence to support a conviction. The Court dismissed the action saying, in part, that issues of sufficiency of evidence do not present constitutional questions and could not be considered in a federal habeas corpus action. The Court did say, however, that it agreed with the Oklahoma Court of Criminal Appeals that the evidence "amply" supported the jury's verdict. Bray v. Lash, (W.D. Okla., Case No. CIV-74-903-E, February 21, 1975). Following the District Court's dismissal, petitioner appealed to the United States Court of Appeals for the Tenth Circuit which affirmed the lower court's decision. Bray v. Lash, (10th Cir., Case No. 75-1269, August 20, 1975).

Finally, petitioner sought post-conviction relief in the Oklahoma Court of Criminal Appeals. This time, petitioner claimed an insufficiency of the evidence to prove beyond a reasonable doubt every element of Attempted Robbery With Firearms. Citing its earlier opinion, the Court reiterated its position that there was "ample evidence to support the conviction." Bray v. State, (Okla.Crim., Case No. PC-79-446, October 17, 1979). From a denial of relief in the aforementioned action, petitioner now seeks a writ of certiorari to the Oklahoma Court of Criminal Appeals.

STATEMENT OF THE FACTS

On April 7, 1967, at approximately 5:30 a.m., Jack Ledford was driving a Safeway tractor-trailor truck north on Lindsay Street, in Oklahoma City, Oklahoma. Mr. Ledford was accompanied by Richard McFarland. As the pair approached the intersection of 10th Street and Lindsay, they noticed a car following them with its lights blinking. The car continued following the truck. Near the intersection of 24th Street and Lindsay, the car passed the truck and forced it to pull over to the curb (Tr. 22). Three black men were in the car. The man sitting next to the passenger door jumped out of the car and opened the truck door on the driver's side (Tr. 13, 22). At that point, the man, weilding a gun, told Ledford and McFarland to get out of the truck or he would kill them (Tr. 13, 22). Ledford refused, whereupon the man fired six shots, five of which struck Ledford in the mouth, neck, arm, elbow, and chest. The shots were fired from a range of two feet (Tr. 14). One of

the bullets passed through Ledford and struck McFarland (Tr. 22, 23). All the while, the assailant was repeatedly shouting, "Fall, you white son-of-a-bitch" (Tr. 14). The assailant was positively identified as the petitioner, Frederick Douglas Bray (Tr. 16, 23, 29, 33).

Additionally, State's Exhibit No. 1, a service revolver, was identified as a weapon similar in appearance to the weapon used by petitioner during the incident (Tr. 17, 26, 36). Harold Akerson, one of petitioner's companions on the morning in question, testified that immediately before the incident, the gun was in petitioner's pants (Tr. 32). Petitioner had told Akerson that he took the gun off of a policeman in Kansas City (Tr. 32, 33). Later, Robert Thornburg, a police officer in Kansas City, positively identified the weapon as one belonging to him and taken from him two weeks preceding the crime (Tr. 48). Officer Thornburg identified petitioner as the person who had taken the weapon from him (Tr. 49).

Akerson also testified that prior to the time petitioner got out of the car, petitioner said that he "was going rob them" (Tr. 33). Akerson later testified that petitioner had said something about getting some money from the truck drivers (Tr. 46, 47).

Following additional testimony regarding the automobile driven by the three black men and a paraffin test made on petitioner, the State rested. Thereupon, petitoner presented the testimony of Aaron Johnson, the third occupant of the car, who stated that he knew of no conversation about a robbery. Johnson did identify the gun used by petitioner (Tr. 72). Petitioner now claims that there was insufficient evidence to show the element of intent to rob.

ARGUMENT

I. THE EVIDENCE, WHEN TAKEN IN A LIGHT MOST FAVORABLE TO THE PROSECUTION, WAS SUFFICIENT TO ALLOW A RATIONAL TRIER OF FACT TO FIND BEYOND A REASONABLE DOUBT THE EXISTENCE OF AN INTENT TO ROB THE VICTIMS.

Petitioner alleges that the State of Oklahoma failed to prove beyond a reasonable doubt the element of "intent to rob" as one of the material elements of the crime of Attempted Robbery With Firearms. In support of his proposition, petitioner cites

Patterson v. New York, 432 U.S. 197, 53 L.Ed.2d 281, 97 S.Ct. 2319 (1977), Hankerson v. North Carolina, 432 U.S. 233, 53 L.Ed.2d 306, 97 S.Ct. 2339 (1977), Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed.2d 508, 95 S.Ct. 1881 (1975), and In re Winship, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970). Petitioner relies on these authorities as requiring the State to prove beyond a reasonable doubt each and every material element of the offense charged. While the State of Oklahoma notes that these cases deal with a possible shifting of the burden of proof in particular instances, the State will certainly agree that it bore the burden of proving beyond a reasonable doubt every material element of Attempted Robbery With Firearms in the present case.

The elements of robbery as defined by Oklahoma law are found in Okla. Stat. tit. 21, § 791 (1971) as follows:

> "Robbery is a wrongful taking of personal property in the possession of another, from his person or immediate presence, and against his will accomplished by means of force or fear."

The added element of "with firearms," used to enhance punishment, is found in Okla. Stat. tit. 21, § 801 (1971). It may be worthy of note that Section 801 as it existed at the time of petitioner's trial varies from Section 801 as it presently exists, in that the former version included the death penalty as a possible punishment.

"Attempt" is defined by Oklahoma law in Okla. Stat. tit. 21, § 44 (1971) as follows:

> "A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:
>
> "(a) purposely engaged in conduct which would constitute the crime if the attendant circumstances were as he believed them to be; or,
>
> "(b) when causing a particular result in an element of the crime, does anything with the purpose of causing or with the belief that it will cause such result, without further conduct on his part."

This statute has been interpreted by the Oklahoma Court of Criminal Appeals, as petitioner correctly points out, to require a showing of three material elements, i.e., (1) intent to commit

a specified crime, (2) performance of an overt act toward the commission of that crime, and (3) failure of consumation. Weimer v. State, 556 P.2d 1020 (Okla.Crim. 1976). Petitioner now argues that there was insufficient evidence to prove an intent to commit the specified crime of Robbery With Firearms.

Before looking to see whether there was sufficient evidence as a matter of law, we must first consider what standard to apply. This Court has recently established a new rule regarding this issue in the case of Jackson v. Virginia, ____ U.S. ____, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979). In Jackson, the majority held that (1) issues of sufficiency of the evidence were proper questions for review in federal habeas corpus actions and that (2) rather than looking to see if the record was devoid of any evidence supporting a conviction, federal courts must look to see if the evidence, when taken in a light most favorable to the prosecution, could allow any rational trier of fact to find beyond a reasonable doubt the existence of the material elements of the offense charged. The Court made clear that upon review of the evidence, the key question is not whether the reviewing judge believes the evidence proves the existence of the material element beyond a reasonable doubt, but rather, whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in the original). 61 L.Ed.2d at 573, citing Johnson v. Louisiana, 406 U.S. 356, 32 L.Ed.2d 152, 92 S.Ct. 1620 (1972). The State of Oklahoma would emphasize the use of the word "could," leaving open the possibility of a rational trier of fact arriving at its factual finding.

Also important to note is that upon review, the evidence must be taken in a light most favorable to the prosecution. 61 L.Ed.2d at 573. Finally, the Court summarized its discussion of law saying habeas corpus relief should be granted "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." 61 L.Ed.2d at 576, 577. Although Jackson grew out of a habeas corpus action, the State of Oklahoma will concede that the standard of review would be the same where a Petition for Certiorari is sought

upon a claim of insufficient evidence to prove guilt beyond a reasonable doubt.

Applying this standard of review to the present case, the question now becomes whether the evidence adduced at trial, when taken in a light most favorable to the prosecution, was sufficient to allow a rational trier of fact to find beyond a reasonable doubt the existence of petitioner's intent to commit a robbery with firearms. The State of Oklahoma submits that there was more than sufficient evidence. The trial transcript reflects the following testimony by Harold Akerson, one of petitioner's companions in the car:

> "Q. Now, prior to the time of getting out of the car, did Bray say anything as to what he was going to do?
>
> "A. Yes, he said that he was going to rob them." (Tr. 33).

Later, the following exchange occurred:

> "Q. Now then, as he got out of the car and after the car had, your car had stopped and the truck had stopped as you have stated here, did he say anything about getting any money or any property or anything?
>
> "BY MR. ANDERSON: Object to this as leading the witness.
>
> "BY THE COURT: Would the Reporter read the question.
>
> "(Reporter's Note: Whereupon the Reporter read back the last question.)
>
> "BY THE COURT: The objection will be overruled. The witness may answer if he recalls.
>
> "BY MR. ANDERSON: Note our exception.
>
> "BY THE COURT: Exception allowed. Go ahead and answer it.
>
> "BY MR. ANDERSON: Will the Reporter read the question back to the witness.
>
> "(Reporter's Note: Whereupon the Reporter again read the last question back.)
>
> "A. Yes, he did say something about getting some money.
>
> "Q. Where did he say he was going to get it?
>
> "A. From the two truck drivers." (Tr. 45, 46).

Finally, on recross examination, Mr. Akerson testified:

"A. I'm still not too sure about what was said when he got out of the car.

"Q. You are not too sure about the answer to the last question that the Reporter repeated to you, are you?

"A. Well, he did say something about getting some money or something.

"BY JUROR: I can't hear him.

"BY THE COURT: Would the Reporter read back the answer? Well, go ahead and re-answer the question.

"A. He did say something about getting some money." (Tr. 46, 47).

The State of Oklahoma will not deny that there were discrepancies between the testimony of Harold Akerson and Aaron Johnson. However, the State submits that any such discrepancies go to the weight and credibility of the testimony and that it is the jury's exclusive province to weigh the evidence in arriving at its factual determination. United States v. White, 589 F.2d 1283 (5th Cir. 1979); United States v. Gordon, 580 F.2d 827 (5th Cir. 1978), cert. denied, ____ U.S. ____, 61 L.Ed.2d 305, 99 S.Ct. 731 (1979); United States v. Young, 573 F.2d 1137 (9th Cir. 1978); McCarty v. United States, 409 F.2d 793 (10th Cir. 1969), cert. denied, 396 U.S. 836, 24 L.Ed.2d 87, 90 S.Ct. 95 (1969).

Additionally, the State of Oklahoma would show this Honorable Court that three courts have addressed the question of sufficiency of the evidence, albeit prior to the decision in Jackson, on four prior occasions. However, the State would emphasize that the language used by said courts reflect that there was not even a question of sufficiency of evidence. Originally on direct appeal, although the question was not directly presented at that time, the Oklahoma Court of Criminal Appeals concluded by saying that "the evidence amply supports the jury's verdict." (Emphasis in the original). Bray v. State, 450 P.2d at 516. Likewise, the United States District Court of Appeals for the Western District of Oklahoma, upon a direct allegation of insufficient evidence, stated at page 4 of its unpublished Order, "[w]e agree with the Oklahoma Court of Criminal Appeals 'that the evidence amply supports the jury's verdict.'" Bray v. Lash, (W.D. Okla., Case No. CIV-74-903-E, February 21, 1975). The Court of Appeals for the

Tenth Circuit, in turn, agreed with the District Court's conclusions in an unpublished Order affirming that court's decision. Bray v. Lash, (10th Cir., Case No. 75-1269, August 20, 1975). Finally, the Oklahoma Court of Criminal Appeals took the opportunity in petitioner's latest attempt to obtain post-conviction relief to affirm its earlier conclusion saying, "there was ample evidence to support the conviction." Bray v. State, (Okla.Crim., Case No. PC-79-446, October 17, 1979).

The State of Oklahoma submits that the aforementioned courts tend to agree that the evidence was more than sufficient to sustain the conviction. The State submits that the evidence, when taken in a light most favorable to the prosecution, was sufficient to allow a rational trier of fact to find beyond a ressonable doubt the existence of petitioner's intent to rob Jack Ledford and Richard McFarland.

II. THE EVIDENCE, WHEN TAKEN IN A LIGHT MOST FAVORABLE TO THE PROSECUTION, WAS SUFFICIENT TO ALLOW A RATIONAL TRIER OF FACT TO FIND BEYOND A REASONABLE DOUBT THE EXISTENCE OF AN OVERT ACT IN FURTHERANCE OF THE CRIME OF ROBBERY WITH FIREARMS.

Petitioner also argues that there was not sufficient evidence to support a finding of an overt act toward the commission of a robbery. Petitioner relies on the facts that no personal property was actually taken and that he never actually demanded any money or property from the occupants of the truck. Petitioner's concept of what constitutes an overt act for purposes of an attempted offense is faulty.

The Oklahoma Court of Criminal Appeals has judicially defined "overt act," as that term is to be used in Oklahoma, in the case of Becker v. State, 45 Okla.Crim. 350, 283 P. 796 (1929). In that case, the Court adopted language from Corpus Juris, saying:

> "No definite rule, applicable to all cases, can be laid down as to what constitues an overt act or acts tending to accomplish a particular case. Each case must depend largely upon its particular facts and the inferences which the jury may reasonably draw therefrom. It is well settled, however, that something more than mere preparation or planning is essential. The accused must take at least one step beyond preparation by doing something directly moving toward and bringing him nearer the crime he intends to commit.

> In other words, while the act need not be the last approximate act to the consumation of the offense intended to be perpetrated, it must be such as will apparently result, in the usual and natural course of events, if not hindered by extraneous causes, in the commission of the crime itself." (Emphasis added). Becker v. State, supra, 283 P. at 801, quoting 16 Corpus Juris, p. 114.

Later, the Oklahoma Court of Criminal Appeals reiterated a definition employed in a previous case:

> "'[An] overt act is sufficient to complete offense of attempt to commit crime, if it goes far enough toward accomplishment of offense to amount to commencement of its consumation.'" (Emphasis added). Taylor v. State, 96 Okla.Crim. 188, 251 P.2d 523, 526 (1952), quoting Dunbar v. State, 75 Okla. Crim. 275, 131 P.2d 116 (1942).

The definition employed by the Oklahoma Court of Criminal Appeals is in accordance with the position taken by federal courts. See, e.g., United States v. Jackson, 560 F.2d 112 (2d Cir. 1977), cert. denied, 434 U.S. 941, 54 L.Ed.2d 301, 98 S.Ct. 434 (1977); United States v. Mandujano, 499 F.2d 370 (5th Cir. 1974), cert. denied, 419 U.S. 1114, 42 L.Ed.2d 812, 95 S.Ct. 792 (1975). Furthermore, the trial court in the instant case instructed the jury in accordance with the above-quoted definitions. The trial court stated in its Instruction No. 4:

> "You are further instructed that every person who attempts to commit the crime of ROBBERY WITH FIREARMS, as this crime has previously been defined, and in such attempt does any act toward the commission of such crime but fails or is prevented or is intercepted in the perpetration thereof is guilty of ATTEMPTED ROBBERY WITH FIREARMS." (Tr. 99).

Under the test for sufficiency of evidence in the constitutional sense as set forth in Jackson v. Virginia, supra, the question now becomes whether the evidence, when taken in a light most favorable to the prosecution, was sufficient to allow a rational trier of fact to find beyond a reasonable doubt the existence of an overt act by petitioner in furtherace of the crime of robbery with firearms.

The State of Oklahoma submits that there was evidence of numerous acts, any one of which would satisfy the definitional requirement. Most obvious of these are the shootings of Jack Ledford and Richard McFarland. Without question, such shootings are acts

beyond the "mere preparation" of the crime of robbery with firearms. The fact that the robbery was not consumated is irrelevant. The shootings were overt acts for purposes of establishing the offense of Attempted Robbery With Firearms.

There was also evidence that petitioner got out of the car in which he was riding and "jerked the door of the truck open" (Tr. 22). Grabbing the truck door was an overt act when viewed in context of the overall scene. Additionally, evidence of petitioner's act of pointing the weapon and simultaneously demanding that the occupants of the truck get out was sufficient to allow the jury to find such action to be an "overt act" within the meaning of Oklahoma's attempt statute.

An "overt act" need be any act, beyond mere preparation, toward the furtherance of a crime. The State of Oklahoma submits that the evidence, when taken in a light most favorable to the prosecution, was sufficient to allow a rational trier of fact to find beyond a reasonable doubt the existence of at least three distinct overt acts by petitioner in furtherance of the crime of robbery with firearms. Petitioner's claim is unfounded.

III. THE TRIAL COURT'S INSTRUCTIONS TO THE JURY SUFFICIENTLY DEFINED THE OFFENSE OF "ATTEMPTED ROBBERY WITH FIREARMS."

Finally, petitioner claims that the trial court's instruction to the jury, specifically Instruction No. 4, did not sufficiently define "attempt." The pertinent portion of Instruction No. 4 has been quoted above and is found at pages 98 and 99 of the record.

In response, the State of Oklahoma would point out, initially, that any purported error regarding Instruction No. 4 or any omitted instructions has been waived due to petitioner's failure to object to Instruction No. 4 or to submit a specific instruction containing the subject matter which petitioner now claims was improperly omitted, as required by Oklahoma law. Okla. Stat. tit. 22, § 831 (1971); Perry v. State, 594 P.2d 782 (Okla.Crim. 1979); Oliver v. State, 568 P.2d 1327 (Okla.Crim. 1977); Luckey v. State, 529 P.2d 994 (Okla.Crim. 1974). This Honorable Court has said in Henderson v. Kibbee, 431 U.S. 145, 52 L.Ed.2d 203, 97 S.Ct. 1730 (1977):

> "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." 431 U.S. at 154.

In the present case, petitioner did not object to the content of Instruction No. 4. Nor did he submit an alternative instruction. Petitioner's sole objection regarding jury instructions was to Instruction No. 6 dealing with the subject of other crimes (Tr. 89, 90). Never did petitioner complain about the definition of "attempt." Petitioner has waived any such complaint.

However, the State of Oklahoma would further submit that Instruction No. 4, in conjunction with the entire set of instructions, properly defined "attempt" in accordance with the law presented above. Instruction No. 4 affirmatively informed the jury of the necessity of an overt act and a failure of consumation. Instruction No. 6 affirmatively informed the jury of the necessity of petitioner forming an intent to commit a robbery. Therefore, the three essential elements of "attempt" were all contained in the instructions.

Moreover, before petitioner can successfully claim constitutional error, he must show that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughten, 414 U.S. 141, 38 L.Ed.2d 368, 94 S.Ct. 396 (1973). This position was reaffirmed in Henderson v. Kibbe, supra. However, in Henderson, this Court pointed out that when a criminal defendant claims error due to an omitted instruction, as petitioner apparently claims in part in the present case, the burden of showing prejudice is "especially heavy." 431 U.S. at 155. The State of Oklahoma submits that petitioner has not, and cannot, satisfy his burden of showing that the jury instructions as given denied him due process.

The State submits that (1) petitioner has waived any claim of error, (2) the jury instructions properly informed the jury as to the material elements constituting an attempt to commit robbery, and (3) petitioner has not shown that the jury instructions denied him due process. Petitioner's claim of error regarding jury instructions is without merit.

CONCLUSION

Under the standard for reviewing claims of insufficient evidence so as to deny a criminal defendant due process as set forth in Jackson v. Virginia, supra, the evidence, when taken in a light most favorable to the prosecution, was sufficient to allow a rational trier of fact to find beyond a reasonable doubt (1) the existence of an intent by petitioner to rob Jack Ledford and Richard McFarland, and (2) the existence of an overt act by petitioner in furtherance of the crime of robbery with firearms. Additionally, the trial court properly instructed the jury as to the material elements of an attempted crime. Petitioner has not made the requisite showing of erroneous instructions so as to constitute a denial of due process.

Finally, the State of Oklahoma submits that the findings of three other courts should be upheld. All three courts concluded that the evidence "amply" supported the jury's verdict. Wherefore, the State of Oklahoma respectfully urges this Honorable Court deny petitioner's request for writ of certiorari.

Respectfully submitted,

JAN ERIC CARTWRIGHT
ATTORNEY GENERAL OF OKLAHOMA

DANNY K. SHADID
ASSISTANT ATTORNEY GENERAL
112 State Capitol Building
Oklahoma City, OK 73105
(405)521-3921

ATTORNEYS FOR RESPONDENT

#913 April 11 Copy

IN THE SUPREME COURT OF THE UNITED STATES

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FREDERICK DOUGLAS BRAY #76252
Petitioner Pro Se

versus

THE STATE OF OKLAHOMA
Respondent.

Case Number: 79-5930

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PETITIONER'S REPLY
and,
PETITIONER'S MOTION TO STRIKE RESPONDENT'S PROPOSITION #1

I

COMES NOW the Petitioner Frederick Douglas Bray and urges in REPLY to the Respondent's Rpoposition #1 the following. The petitioner states that the Respondent Danny Shadid has falsely and erroneously said in his Proposition #1 that "INTENT" was the Issue Presented". The petitioner points out that his argument is the failure of the prosecutor to produce any testimony at his jury trial in support of the following:

"ATTEMPTED TO TAKE PERSONAL PROPERTY FROM JACK LEDFORD"

The above allegation is the "OVERT ACT" that is set out on the face of the Information #33558.

The Asiistant Attorney General Danny Shadid falsely and erroneously contended that the "SHOOTING" is an essential element of robbery. The Petitioner urges that "SHOOTING" is a wholly separate crime and is not an element of robbery. ASPORTATION is the essential element of robbery and, in this instant case, Attempted Asportation is the "OVERT ACT" in controbersy here. See....Respondent's Response #79-5930 where Danny Shadid said:

Proposition #1 "Whether the evidence at trial, when taken in a light most favorable to the prosecution was sufficient to allow a rational trier of fact to find beyond a reasonable doubt the existence of an INTENT to rob the victim."

The Petitioner Frederick Douglas Bray states that the above Proposition #1 is false and erroneous for the following reasons.

The Respondent falsely claims that INTENT is the "ISSUE PRESENTED" but the Opinion #PC-79-446 of the Oklahoma Court of Criminal Appeals states the following:

See ..... Opinion #PC-79-446 .....

> Frederick Douglas Bray "seeks to have the conviction in Oklahoma County Case Number 33558 set aside on the ground that there was not proof beyond a reasonable doubt of EVERY NECESSARY FACT in the conviction. In affirming his conviction in that case, this court stated that there was ample evidence to support the conviction. See BRAY V. STATE, Okl. Cr., 450 P.2d at 516.
>
> For that reason, the denial of petitioner's Application for post conviction relief is hereby affirmed.
>
> So Ordered.
>
> Witness Our Hands And The Seal Of This Court, this 17th day of October, 1979."
>
> /s/ Tom Cornish, Presiding Judge
>
> /s/ Tom Brett, Judge
>
> /s/ Hez Bussey, Judge

The charge set out in INFORMATION #33558 is as follows:

> "* * * DID ATTEMPT TO TAKE PERSONAL PROPERTY FROM JACK LEDFORD"

The petitioner set out his Argument Part A, page #8, of the Petition For Writ of Certiorari as follows:

> "No witness testified that Frederick Douglas Bray (1) took any money or property, (2) no witness testified that Frederick Douglas Bray requested the victim to give him any money or property and (3) no witness testified that Frederick Douglas Bray attempted to take any money or property, thus, there is no proof in the record that the prosecutor proved beyond a reasonable doubt the essential element "DID ATTEMPT TO TAKE PERSONAL PROPERTY."

As shown above, INTENT IS not the issue presented, to the contrary, the issue presented is the failure of the prosecutor to submit evidence in support of the charge set out on the face of the INFORMATION #33558 "DID ATTEMPT TO TAKE PERSONAL PROPERTY". In other words ASPORTATION or rather attempted ASPORTATION which is the alleged "OVERT ACT".

The Assistant Attorney General Danny Shadid erroneously claimed that the "SHOOTINC" is an element of robbery and based his entire argument upon this fallacy. The Defendant Frederick Douglas Bray was tried and convicted by a jury in a separate trial for the "SHOOTING"; see BRAY V. STATE, Okl. Cr., 450 P.2d 512. The "OVERT ACT" in a given robbery case is ASPORTATION or an Attmepted Asportation.

II

The petitioner Frederick Douglas Bray moves to strike the Respondent's first Proposition since "INTENT" is not the issue presented. The petitioner points out that the Respondent Danny Shadid is an attorney and, for that reason, there is a presumption of competence since Danny Shadid is an Assistant Attorney General. But compare the following as the same appears in the Respondent's Response #79-5930, page #1

Respondent's Response #1 ... "Whether the evidence at trial, when taken in a light most favorable to the prosecution, was sufficient to allow a rational trier of fact to find beyond a reasonable doubt the existence of an INTENT to rob the victim.

/s/ Danny Shadid, Assistant Attorney General
Dated March 25, 1980

The Petitioner Frederick Douglas Bray moves to strike the above contention since the Respondent has falsely and erroneously set out an issue that does not appear in the Petitioner's Petition For Writ Of Certiorari #79-5930.

CONCLUSION

Wherefore the petitioner prays that the court will grant the petitioner's motion To Strike the Respondent's Response #1 as set out above. It is so Prayed.

Respectfully submitted,

Frederick D. Bray
Frederick Douglas Bray, #76252